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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 28, and 52

**[FAC 2005-77; FAR Case 2011-023; Item II; Docket 2011-0023,
Sequence 1]**

RIN 9000-AM53

Federal Acquisition Regulation; Irrevocable Letters of Credit

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to remove all references to Office of Federal Procurement Policy (OFPP) Pamphlet No. 7, Use of Irrevocable Letters of Credit, and also provide updated sources of data required to verify the credit worthiness of a financial entity issuing or confirming an irrevocable letter of credit (ILC).

DATES: Effective: **[INSERT DATE 30 DAYS AFTER PUBLICATION
IN THE FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at 202-219-0202, for clarification of content. For information pertaining to status or

publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-77, FAR Case 2011-023.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 78 FR 26573 on May 7, 2013, to remove all references to OFPP Pamphlet No. 7, Use of Irrevocable Letters of Credit, and provide updated sources of data required to verify the credit worthiness of a financial entity issuing or confirming an ILC.

OFPP Pamphlet No. 7 provided detailed guidance for implementing policy letter 91-4, Use of Irrevocable Letters of Credit, for Government contracts. A prior FAR final rule (FAR Case 2000-605, Rescission of Office of Federal Procurement Policy Letters, 65 FR 36014) removed the FAR references to OFPP Policy Letter 91-4 along with several other policy letters that were rescinded by OFPP, effective March 30, 2000 (see 65 FR 16968). However, the reference to OFPP Pamphlet No. 7 remained in FAR part 28 because the information was considered relevant and provided, among other information, a listing of available quantitative and qualitative credit rating institutions and resources, formats for ILCs, and other useful data.

FAR 28.204-3 currently cites OFPP Pamphlet No. 7 at paragraphs (g)(1) and (h)(1) as an available resource that may be used to obtain information on credit rating services or investment grade ratings of financial entities issuing or confirming ILCs because it provides overarching policy and specific guidance on the use of ILCs, but some of the information is outdated. Therefore, instead of referencing the OFPP Pamphlet, this rule—

(1) Extracts from the OFPP Pamphlet the relevant and current information for inclusion in the FAR; and

(2) Provides additional sources of data required to verify the credit worthiness of a financial entity issuing or confirming an ILC, as summarized on the Web sites of the Federal Deposit Insurance Corporation

(<http://www2.fdic.gov/idasp/index.asp>) and Securities and Exchange Commission

(<http://www.sec.gov/answers/nrsro.htm>).

Five respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of significant changes.

This final rule reflects no change to the proposed rule.

B. Analysis of public comments.

The Regulatory Secretariat received public comments from five entities in response to the proposed rule. A discussion of these comments is provided as follows:

1. Support for the proposed rule

Comment: Two respondents expressed support for the rule.

Response: The Councils acknowledge the public support for this rule.

2. Standby letters of credit

Comment: Five respondents recommended that the proposed rule recognize and permit the use of standby letters of credit, in accordance with International Standby Practices (ISP 98), as described in International Chamber of Commerce Publication No. 590.

Response: The intent of the proposed rule, as stated in the published preamble is as follows: "... to remove all references to the Office of Federal Procurement Policy (OFPP) Pamphlet No. 7, Use of Irrevocable Letters of Credit (ILC), and also provide updated sources of data required to verify the credit worthiness of a financial entity issuing

or confirming an ILC." As a result, the inclusion of ISP 98 is considered to be a substantive change and thus beyond the scope of this case.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This action is necessary to remove all references to OFPP Pamphlet No. 7, Use of Irrevocable Letters of Credit, and provide updated sources of

data required to verify credit worthiness of a financial entity issuing or confirming an ILC.

The objective of the rule is to provide up-to-date and readily available information on requirements regarding credit rating for the financial institution issuing or confirming an ILC.

This will apply to all contracts for services, supplies, or construction, when a bid guarantee or performance and payment bonds are required. 40 U.S.C. 3131 requires performance and payment bonds for any construction contract exceeding \$100,000; this was raised for inflation to \$150,000 (see FAR 1.109). Any person required to furnish a bond has the option to furnish a bond secured by an ILC.

For construction contracts valued at \$30,000 to \$150,000, alternative payment protection is required, which may involve an ILC. Generally, agencies do not require bonds for other than construction contracts. According to data from the Federal Procurement Data System, in FY 2011 there were about 58,000 new awards for construction and construction maintenance, of which 41,000 were awarded to small businesses (about 70 percent). If we estimate that 10 percent of these awards involve an ILC, then this rule applies to approximately 4,100 small businesses.

The rule only removes references to OFPP Pamphlet No. 7 and replaces these references with information relative to sources of data required to verify an ILC that generally replicates what was in the pamphlet. There are no new reporting, recordkeeping, or compliance requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules.

No significant alternatives to the rule were identified that would accomplish the objectives of the rule. We do not foresee any significant economic impact of the rule on small entities. The basic requirements remain unchanged; the requirements of the pamphlet are directly stated, some of the references have been updated, and a Web site provided for access to a list of Nationally Recognized Statistical Rating Organizations.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has

submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The rule does not contain any new information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C Chapter 35). However, there is a pre-existing requirement at FAR 52.228-14 for offerors/contractors to provide the contacting officer a credit rating that indicates the financial institutions have the required credit rating as of the date of issuance of the ILC. OMB Control Number 9000-0045, titled: Bid Guarantees, Performance and Payment Bonds, and Alternative Payment Protections, covers the information collection requirements associated with alternative payment protections (including ILCs) and acceptable security for bonds (including ILCs). ILCs are seldom offered as alternative payment protection or security for a bid bond, performance bond, or payment bond. The negligible burden of providing a credit rating along with the required ILC is already sufficiently covered by the approved burden hours in 9000-0045.

List of Subjects in 48 CFR Parts 1, 28, and 52

Government procurement.

Dated: September 30, 2014.

William F. Clark,
Acting Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 28, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 28, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Amend section 1.106, in the list following the introductory text, by adding in numerical sequence, FAR segment "52.228-14" and its corresponding OMB Control No. "9000-0045".

PART 28—BONDS AND INSURANCE

3. Amend section 28.204-3 by revising the section heading and paragraphs (a), (g), and (h) to read as follows:

28.204-3 Irrevocable letter of credit.

(a) Any person required to furnish a bond has the option to furnish a bond secured by an irrevocable letter of credit (ILC) in an amount equal to the penal sum required to be secured (see 28.204). A separate ILC is required for each bond.

* * * * *

(g) Only federally insured financial institutions rated investment grade shall issue or confirm the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.

(1) The offeror/contractor is required by paragraph (d) of the clause at 52.228-14, Irrevocable Letter of Credit, to provide the contracting officer a credit rating from a recognized commercial rating service that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC.

(2) To support the credit rating of the financial institution(s) issuing or confirming the ILC, the contracting officer shall verify the following information:

(i) Federal insurance: Each financial institution is federally insured. Verification of federal insurance is available through the Federal Deposit Insurance Corporation (FDIC) institution directory at the website <http://www2.fdic.gov/idasp/index.asp>.

(ii) Current credit rating. The current credit rating for each financial institution is investment grade and that the credit rating is from a Nationally Recognized

Statistical Rating Organization (NRSRO). NRSROs can be located at the website <http://www.sec.gov/answers/nrsro.htm> maintained by the SEC.

(3) The rating services listed in the website <http://www.sec.gov/answers/nrsro.htm> use different rating scales (e.g., AAA, AA, A, BBB, BB, B, CCC, CC, C, and D; or Aaa, Aa, A, Baa, Ba, B, Caa, Ca, and C) to provide evaluations of institutional credit risk; however, all such systems specify the range of investment grade ratings (e.g., BBB-AAA or Baa-Aaa in the examples in this section) and permit evaluation of the relative risk associated with a specific institution. If the contracting officer learns that a financial institution's rating has dropped below investment grade level, the contracting officer shall give the contractor 30 days to substitute an acceptable ILC or shall draw on the ILC using the sight draft in paragraph (g) of the clause at 52.228-14.

(h) A copy of the Uniform Customs and Practice (UCP) for Documentary Credits, 2006 Edition, International Chamber of Commerce Publication No. 600, is available from: ICC Books USA, 1212 Avenue of the Americas, 21st Floor, New York, NY 10036; Phone: 212-703-5066; Fax: 212-391-6568; E-Mail: iccbooks@uscib.org; Via the Internet at: <http://store.iccbooksusa.net>.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Amend section 52.228-14 by revising the date of the clause and paragraphs (d), (e)5, and (f)5 to read as follows:

52.228-14 Irrevocable Letter of Credit.

* * * * *

IRREVOCABLE LETTER OF CREDIT ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS
AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(d)(1) Only federally insured financial institutions rated investment grade by a commercial rating service shall issue or confirm the ILC.

(2) Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.

(3) The Offeror/Contractor shall provide the Contracting Officer a credit rating that indicates the financial institutions have the required credit rating as of the date of issuance of the ILC.

(4) The current rating for a financial institution is available through any of the following rating services registered with the U.S. Securities and Exchange Commission (SEC) as a Nationally Recognized Statistical Rating Organization (NRSRO). NRSRO's can be located at the website <http://www.sec.gov/answers/nrsro.htm> maintained by the SEC.

(e) * * *

5. This Letter of Credit is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, International Chamber of Commerce Publication No.

(Insert version in effect at the time of ILC issuance, e.g., "Publication 600, 2006 edition") and to

* * * * *

5. This confirmation is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, International Chamber of Commerce Publication No. _____ (Insert version in effect at the time of ILC issuance, e.g., "Publication 600, 2006 edition") and to the extent not inconsistent therewith, to the laws of _____ [State of confirming financial institution].

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